2001

Ersell Harris Jr. v. Samuel W. Smith : Brief of Respondent

Utah Supreme Court

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BRIEF

STATE OF UTAH

ERSELL HARRIS, JR.,
Plaintiff-Appellant,

vs.

SAMUEL W. SMITH, Warden, Utah State Prison,
Defendant-Respondent.

Case No. 13859

BRIEF OF RESPONDENT

APPEAL FROM THE DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PETER F. LEARY, JUDGE, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from an order of the Third Judicial District Court, the Honorable Peter F. Leary, presiding, denying appellant's petition for writ of habeas corpus.

DISPOSITION IN LOWER COURT

Appellant filed an original petition on March 7, 1974,

and an amended petition on July 10, 1974, seeking release from the Utah State Prison. The Court heard arguments and representations of counsel at a hearing held on August 29, 1974. On August 30, 1974, the Honorable Peter F. Leary ruled appellant's petition and amended petition for writ of habeas corpus was without merit and should be dismissed with prejudice.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the order denying appellant's petition for writ of habeas corpus.

STATEMENT OF FACTS

The appellant is presently an inmate who is being held in the custody of the respondent at the Utah State Prison pursuant to a judgment of conviction of the crime of forging a check in violation of Utah Code Ann. § 76-26-1 (1953) (R. 53).

In 1967 appellant was initially charged with the crime of uttering a fictitious check in violation of Utah Ann. § 76-26-7 (1953). On the motion of respondent's counsel, Mr. Barney, the original charge was dropped and a substitute charge of forging and uttering a check in violation of Utah Code Ann. § 76-26-1 (1953), was prosecuted (R. 54). On September 28 and 29, 1970, the appellant was tried by a jury and was found guilty of the offense charged. Pursuant to the judgment, the Honorable Merrill C. Faux of the Third District Court for Salt Lake County, sentenced the appellant to serve an

indeterminate term of one to twenty years. The conviction was subsequently sustained by the Supreme Court of the State of Utah on January 7, 1974 (R. 54). See *State* v. *Harris*, 30 Utah 2d 354, 517 P. 2d 1313 (1974). Imposition of the prior sentence was ordered on February 11, 1974, shortly after the judgment of conviction was affirmed.

ARGUMENT

POINT I.

THE COMPLAINT WAS SUFFICIENT TO INVOKE THE JURISDICTION OF THE COURT AND PROVIDE THE APPELLANT WITH NOTICE OF THE OFFENSE WITH WHICH HE WAS CHARGED.

The appellant alleges on this appeal that the complaint was insufficient and did not provide him with adequate notice of the offense with which he was charged. In sum, he contends that the complaint was invalid and unable to invoke the jurisdiction of the court.

The long-standing rule regarding the suficiency of the complaint to invoke a court's jurisdiction was stated in *Batley* v. *Ritchie*, 73 Utah 320, 273 Pac. 969 (1928), as follows:

> "The test of sufficiency, however, of an accusation for the purpose of invoking jurisdiction, is not the test to which such pleading is subjected when attacked by motion or demurrer.

> "Where it is clear that an attempt has been made to charge an offense of a kind over which the court has jurisdiction the accusation is sufficient to invoke the jurisdiction of the court. 29 C. J. 41. The inquiry in such case is not whether there is in the accusation such specific allegations of the details of the charge as would make it good on demurrer, but whether it describes a class of offenses of which the court has jurisdiction and alleges the defendant to be guilty." 273 Pac. at 971.

Additional support is found for this test in *State* v. *Pay*, 45 Utah 411, 146 Pac. 300 (1951), wherein the court held as follows:

> ". . . the offense need not be stated in technical language, nor in such specific terms as is required by an information or an indictment. It is sufficient that the jurisdictional facts appear and that the crime is stated in ordinary language. The language need not even be concise or without repetition. The only test is: Are all the elements constituting the offense stated?" 146 Pac. at 305.

See also *State* v. *Colston*, 16 Utah 2d 89, 396 P. 2d 405 (1964); *State* v. *Scow*, 101 Utah 564, 125 P. 2d 954 (1942); and *State* v. *Burke*, 102 Utah 249, 129 P. 2d 560 (1942).

The complaint in dispute stated the general name of the crime charged, the title, chapter, and section of the crime in the Code and described the alleged acts of the plaintiff which constituted the crime. There can be little

doubt that such detail more than satisfies the test of describing a class of offenses of which the lower court had jurisdiction. The complaint presently under review satisfies all six of the statutory elements of Utah Code Ann. § 77-11-1 (1953), with regard to the contents of a complaint.

Appellant's own counsel recognized the weakness of this argument when he admitted that "citing the title of forgery and the section is sufficient for a complaint" (R. 71).

In support of appellant's argument, he cites *State* v. *Jensen*, 103 Utah 478, 136 P. 2d 949 (1943). The *Jensen* case articulates the difference between a fictitious and a forged instrument. The requisite elements for each offense are reviewed in detail. The central issue of the case was whether defendant was given a preliminary hearing on the offense for which she was charged. Although the issues in the case at hand are different from those of *Jensen*, the dictum of the case supports the respondent's proposition that the appellant was properly charged and that the lower court had jurisdiction over the controversy.

Secondly, the complaint clearly gives the appellant adequate notice of the offense with which he was charged. The language of the complaint fully apprised the appellant of the precise charge that the State had filed against him. See *State* v. *Colston*, *supra*. However, specific terms or technical language as may be required by an informa-

tion or an indictment, are not essential elements of a complaint. See *State* v. *Pay*, *supra.*

It is clear from the aforementioned case law that a complaint need only satisfy the notice requirements of Utah Code Ann. § 77-11-1 (1953). A complaint is not an information or an indictment therefore it need not comply with Utah Code Ann. § 77-21-8 (1953). See *State* v. *Pay*, *supra.* However, the point need not be argued as the complaint filed against the appellant clearly satisfies subsection (a) of Utah Code Ann. § 77-21-8 (1953).

In sum, there appears to be no basis or merit to appellant's claims that the complaint was invalid and insufficient on its face. The complaint under consideration satisfies the aforementioned case law and statutory standards. Further, appellant's own counsel even admitted to weakness of the argument (R. 71).

POINT II.

APPELLANT'S CONVICTION AND SENTENCE BY THE TRIAL COURT WAS AFFIRMED BY THE UTAH STATE SUPREME COURT AND THE TRIAL COURT JUDGMENT WAS THEREAFTER PROPERLY ENFORCED AGAINST THE APPELLANT.

The appellant was convicted of forgery before the Honorable Merrill C. Faux, in Third District Court on

September 29, 1970. He was sentenced to serve an indeterminate term of one to twenty years as provided by law. Appellant's conviction was still on appeal on the effective date of the new criminal code. Thereafter, the Supreme Court of the State of Utah affirmed his conviction in *State* v. *Harris*, 30 Utah 2d 354, 517 P. 2d 1313 (1974).

The Utah Code of Criminal Procedure requires the enforcement of an affirmed judgment in Utah Code Ann. § 77-42-5 (1953). "If a judgment against the defendant is affirmed, the original judgment must be enforced."

On February 11, 1974, the trial court through the Honorable Joseph G. Jeppson, merely enforced its indeterminate sentence which was previously directed against the plaintiff. Therefore, there was in fact no resentencing, as the appellant's trial court sentence was summarily enforced by virtue of Utah Code Ann. § 77-42-5, *supra*, when the trial court's judgment and sentence was affirmed by the Utah State Supreme Court.

The available case law uniformly supports the above conclusion. In *People* v. *Sweeney*, 55 C. 2d 27, 9 Cal. Rptr. 793, 357 P. 2d 1049 (1960), the court held on the basis of a statute which was identical to Utah Code Ann. § 77-42-5, *supra*, as follows:

> "The judgment is the sentence and appealing from both is tautological. The affirmance of the judgment carries with it the affirmance of the sentence." 357 P. 2d at 1052.

The trial court, through the Honorable Peter F. Leary, reviewed the merits of this petition and similarly held that appellant's contention was without merit (R. 49):

> "The Court finds that pursuant to Section 77-42-5, Utah Code Annotated (1953) upon affirmance of a judgment by the appellate Court, the trial Court must enforce the original judgment (sentence) and must make all orders necessary to carry it into effect. The Court further finds that the trial Court is without jurisdiction to alter, amend, modify or vacate said judgment. (*People* v. *Maggio*, 274 P. 611.)"

It therefore appears that appellant's argument is without merit. The trial court acted properly in summarily enforcing the judgment and sentence against appellant when his conviction and sentence was affirmed by the Supreme Court of the State of Utah.

Appellant also contends that he is entitled to be resentenced in accordance with the provisions of the more recent Utah Criminal Code. The contention, however, its unfounded in the face of a savings clause in the new code. Utah Code Ann. § 76-1-103(2) (1953), states:

> "Any offense committed prior to the effective date of this code shall be governed by the law, statutory and non-statutory, existing at the time of commission thereof, except that a defense or limitation on punishment available under this code shall be available to any defendant tried or retried after the effective date. An

> offense under the laws of this state shall be deemed to have been committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto."

Utah case law in *State* v. *Miller*, 24 Utah 2d 1, 464 P. 2d 844 (1970), has construed a savings clause similar to Utah Code Ann. § 76-1-103(2) (1953). The court in *Miller* held that the savings clause preserved the former punishment and that the accused was not entitled to have his case remanded for sentencing in accordance with the new statutory penalties. Such a position is well established in Utah jurisprudence as demonstrated by *People* v. *Sloan*, 2 Utah 326 (1877).

The effective date of the new Utah Criminal Code is July 1, 1973, as provided in Utah Code Ann. § 76-1-102 (1953). The appellant was charged with committing the crime of forgery on or about July 22, 1967. Therefore, Utah Code Ann. §§ 76-1-102 and 103(2) clearly preclude the application of the new code provisions to the appellant's case.

The trial court's decision is in agreement with the respondent's argument (R. 48). Based on *State* v. *Tapp*, 26 Utah 2d 392, 490 P. 2d 334 (1971), the court held that since appellant was "tried, convicted and sentenced prior to the enactment and effective dates of said sections (Utah Code Ann. §§ 76-1-401 and 402 and 76-6-501(4) (1953)), he is subject to the provisions of the law in effect at the time of his trial and judgment."

POINT III.

THIS COURT SHOULD NOT CONSIDER ISSUES THAT WERE NOT RAISED OR ADJUDICATED IN THE TRIAL COURT.

Appellant contends in Point III of his brief that the new savings clause operates as a denial of equal protection of the law. A careful review of the lower court record indicates that the appellant failed to raise this issue in any pleading, memorandum, or oral presentation made to the court below.

Utah case law uniformly holds that a party may not raise an issue on appeal that was not initially presented to the trial court. This Court in *Evans* v. *Stand*, 74 Utah 451, 280 Pac. 239 (1929), concisely articulated the rule as follows:

> "The rule is well settled that on an appeal the parties are restricted to the theory on which the case was prosecuted or defended in the court below." 280 Pac. at 240.

See also *Twenty-Second Corp.* v. *Oregon Short Line R. Co.*, 36 Utah 238, 103 Pac. 243 (1909); *In re Beason's Estate*, 49 Utah 24, 161 Pac. 678 (1916); and *Upton* v. *Heiselt*, 118 Utah 573, 223 P. 2d 428 (1950).

The reasoning which supports such a rule was reviewed by Justice Wolf in *Fisher* v. *Bank of Spanish Fork*, 93 Utah 514, 74 P. 2d 659 (1937), as follows:

> "In passing, it may be pointed out that it

> is the policy of the law to require parties to expose all their theories on which they base a claim or defense in the lower courts so that their adversaries and the court may be appraised of them. A new theory raised for the first time in the appellate court as a basis to sustain a claim or defense will ordinarily not be considered." 74 P. 2d at 660.

Therefore, since appellant's equal protection theory was not presented to the lower court and was subsequently raised for the first time on this appeal, it must be disregarded by this court.

POINT IV.

APPELLANT'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAW ARE NOT VIOLATED BY THE SAVINGS CLAUSE OF THE UTAH CRIMINAL CODE.

In the event that this Court elects to review the appellant's equal protection issue, the respondent has included the following argument which questions the actual merit of this issue.

Appellant contends that the savings clause of the Utah Criminal Code, Utah Code Ann. § 76-1-103(2) (1953), creates two classes of criminal defendants which are not treated alike. He alleges, that since the appellant is not afforded the benefit of the lesser penalty which is codified in the more recent criminal code, that he is

being unconstitutionally denied equal protection of the law.

The facts associated with Point II of this brief demonstrate that the appellant was convicted and sentenced prior to the time when the new criminal code took effect. Therefore, the case law of *State* v. *Tapp*, 26 Utah 2d 392, 490 P. 2d 334 (1971); *Belt* v. *Turner*, 25 Utah 2d 380, 483 P. 2d 425 (1971); or *State* v. *Miller*, 24 Utah 2d 1, 464 P. 2d 844 (1970), is not available to support his position. The court in *Belt* clearly holds that a legislative decision to alter the penalty which will be imposed for a certain crime, does not raise a constitutional question:

> "The power of the legislature to repeal or amend the penalty to be imposed for crime is not a matter of judicial concern. It is a part of the sovereign power of the state, and it is the exclusive right of the legislature to change or amend it; and if the amendment becomes effective before a final judgment of sentence is pronounced, the amendment controls the punishment to be meted out . . . If the state wishes to declare a lesser penalty for a crime, it may do so and no constitutional question would be involved." 25 Utah 2d at 381.

It is evident that the legislature is granted plenary powers to alter the State's penal code. It is presumed that legislative decisions are founded on a rational basis. This Court in *State* v. *Nielsen*, 19 Utah 2d 66, 426 P. 2d

13 (1967), held that legislative measures should be interpreted to satisfy constitutional standards:

> "The general rule of statutory construction is to hold an enactment of the legislature valid unless it clearly appears to violate some provision of the constitution of this State or of the United States." 426 P. 2d at 15.

In light of the aforementioned caset law, it appears that the savings clause of the new Utah Criminal Code is constitutional and that it does not deny the appellant of any of his constitutional rights.

CONCLUSION

For the reasons above stated, respondent respectfully submits that this Court should affirm the dismissal of the writ of habeas corpus by the Third District Court.

Respectfully submitted,

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